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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY FINLEY, Defendant and Appellant.	B290063 (Los Angeles County Super. Ct. No. LA025075)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan Judge. Affirmed.

Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Johnny Finley appeals from an order denying his petition for recall of his sentence under Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126).[1] The trial court concluded appellant was ineligible for relief under section 1170.126, subdivision (e)(2) (section 1170.126(e)(2)) because the facts underlying his conviction for corporal injury to a spouse demonstrated beyond a reasonable doubt that he intended to cause great bodily injury during the offense.

Appellant contends section 1170.126(e)(2) does not authorize the court to look beyond the judgment of his conviction. He argues that the plain language of that provision, coupled with its placement in the statutory scheme, permits only a limited review of the judgment of conviction. He urges us to reconsider the contrary holding of a decision by the Fifth District, *People v. Blakely* (2014) 225 Cal.App.4th 1042 (*Blakely*), which the Supreme Court recently endorsed in *People v. Estrada* (2017) 3 Cal.5th 661 (*Estrada*). Appellant further contends that broad review of the facts of conviction subjects section 1170.26(e)(2) to "constitutional doubt on equal protection grounds." He asserts that *People v. Frierson* (2017) 4 Cal.5th 225 (*Frierson*) and *People v. Arevalo* (2016) 244 Cal.App.4th 836 (*Arevalo*) impermissibly afford greater opportunities for Proposition 36 relief to petitioners who were charged with and acquitted of disqualifying factors than those who were never charged with a disqualifying factor.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1996, the Los Angeles County District Attorney ("the

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[1]All further statutory references are to the Penal Code unless otherwise indicated.

People") filed an information alleging appellant—then known as Arick Ware—inflicted corporal injury resulting in traumatic condition upon his spouse (§ 273.5, subd. (a)), used a deadly weapon while doing so (§ 12022, subd. (b)), and assaulted his spouse with a deadly weapon (§ 245, subd. (a)(1)). The information further alleged appellant suffered two prior strike convictions for robbery (§ 211). After a bench trial, the court found appellant guilty of inflicting corporal injury upon his spouse. It acquitted him of assault with a deadly weapon, however, and further found the weapon use enhancement untrue. The court found the prior strike allegations true, denied appellant's *Romero*[2] motion, and sentenced appellant to a third-strike sentence of 25 years to life. We affirmed appellant's conviction on direct appeal. (*People v. Ware* (June 25, 1998, B111149) [nonpub. opn.].)

"In 2012, the electorate passed the Three Strikes Reform Act of 2012 ([Proposition 36]) (Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012)), which amended the [Three Strikes] law to reduce the punishment prescribed for certain third strike defendants." (*People v. Conley* (2016) 63 Cal.4th 646, 651.) Proposition 36 "established a procedure for 'persons presently serving an indeterminate term of imprisonment' under the prior version of the Three Strikes law to seek resentencing under the Reform Act's revised penalty structure." (*Id.* at p. 653.) "But Proposition 36 makes a defendant ineligible for this limitation on third strike sentencing if one of various grounds for ineligibility applies." (*People v. Perez* (2018) 4 Cal.5th 1055, 1062.) As relevant here, a defendant is ineligible for recall of his or her sentence if, "[d]uring the commission of the current offense, the

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[2]*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

defendant . . . intended to cause great bodily injury to another person." (§ 1170.12, subd. (c)(2)(C)(iii); see also § 1170.126(e)(2).)

In December 2012, appellant filed a petition for recall of sentence under Proposition 36. The trial court issued an order to show cause directing the People to show why the petition should not be granted. After receiving one extension of time, the People filed an opposition arguing that appellant was ineligible for relief because the record of conviction showed that he used deadly weapons—a typewriter roller and a hammer—and intended to inflict great bodily injury on his spouse during the 1996 incident. Appellant requested and received numerous extensions of time to respond to the opposition. Before appellant responded, the People in August 2016 filed a lengthy supplemental opposition reiterating and elaborating upon their ineligibility arguments.

In August 2017, the trial court issued an order to show cause directing appellant, who still had not responded to the People's filings, to demonstrate why his petition should not be dismissed as abandoned. After another extension, appellant filed a brief in support of his petition in November 2017. He argued he was eligible for resentencing because his acquittal on the weapons charge and use enhancement at trial precluded the court from finding that he used a weapon during the offense. He did not address the issue of his intent.

The court heard the petition in February 2018. At the hearing, the People abandoned their argument that appellant was ineligible due to his use of a weapon and focused exclusively on his intent to cause great bodily injury, as demonstrated by evidence in the record of conviction. They argued that the injuries appellant's spouse sustained—a "busted" and "swollen" left eye, a "ripped" ear with a hematoma, "a dent on her forehead"

necessitating a CT scan, a "large oblong bruise on her back" consistent with being stricken by a blunt object, and contusions on her wrists and ankles—proved appellant intended to cause her great bodily harm. Appellant disputed the People's descriptions of the victim's injuries, which he argued did not amount to great bodily injury and did not cause permanent damage. He also argued he lacked the intent to cause great bodily injury because he was "under the influence and was paranoid" during the altercation, and he "stopped the fight basically and walked out." The court took the matter under submission and considered post-hearing briefing by both sides before rendering its written decision in March 2018.

Relying on *Blakely*, *supra*, 225 Cal.App.4th 1042 and other cases following it, the court considered not only the judgment of conviction but also "relevant, reliable, admissible portions of the record of conviction to determine the existence or nonexistence of disqualifying factors." From that evidence, primarily the nature of the victim's injuries, the court concluded beyond a reasonable doubt that appellant acted with an intent to cause great bodily injury. The court agreed with appellant (and accepted the People's concession) that it could not find appellant ineligible due to his use of a deadly weapon because he was acquitted of the assault charge and weapon use enhancement. The court determined that the acquittals did not preclude it from finding ineligibility on intent grounds, however, because the acquittals were "based on a finding of insufficient evidence regarding [appellant's] use of a weapon, not the degree of force used or the seriousness of [the victim's] injuries." It reasoned, "[a] finding beyond a reasonable doubt that [appellant] used force likely to cause great bodily injury, and therefore intended the natural

consequence of that action, would not be contrary to any issue actually decided on the merits by the trial court." The court accordingly found appellant ineligible for relief and denied his petition for recall of sentence.

Appellant timely appealed.

DISCUSSION

Appellant does not dispute that the record contains substantial evidence he acted with the intent to cause great bodily injury. Instead, he primarily argues that the court erred by considering evidence beyond the judgment of conviction. In appellant's view, the express language and statutory placement of section 1170.126(e)(2) restrict the court to examining "for what offense the current sentence was imposed, or in other words whether the disqualifying factor is encompassed in the judgment" itself. To the extent that *Blakely*, *supra*, 225 Cal.App.4th 1042 and its progeny hold otherwise, he contends those cases should be reconsidered in light of *Arevalo*, *supra*, 244 Cal.App.4th 836 and *Frierson*, *supra*, 4 Cal.5th 225. To the extent that California Supreme Court cases *People v. Estrada*, *supra*, 3 Cal.5th 661 and *People v. Perez*, *supra*, 4 Cal.5th 1055 hold or suggest otherwise, appellant contends they are not binding because they did not consider the precise arguments he raises here.

Appellant also contends section 1170.126(e)(2) is "vulnerable to an equal protection attack" after *Arevalo* and *Frierson*, which adopted *Arevalo*'s analysis. He posits that two groups of similarly situated defendants, those who are charged with and acquitted of disqualifying conduct, and those who are never charged with disqualifying conduct, are treated impermissibly differently: the former group is protected from a finding of ineligibility by the acquittal, while the latter may be

found ineligible based on uncharged conduct. Appellant argues there is no rational basis for such differential treatment, and contends the "canon of constitutional doubt" empowers this court to "take a proactive approach" and construe section 1170.126(e)(2) to limit the scope of review to the judgment of conviction.

We evaluate appellant's claims regarding the legal issues of statutory interpretation and equal protection de novo. (*Blakely*, *supra*, 225 Cal.App.4th at p. 1053; *People v. Wolfe* (2018) 20 Cal.App.5th 673, 687.)

I. Statutory Interpretation

An incarcerated petitioner serving a three-strike sentence may be eligible for resentencing under section 1170.126(e)(2) if his or her "current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." As relevant here, section 1170.12, subdivision (c)(2)(C)(iii) describes offenses in which "the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person."

Appellant argues the plain language of section 1170.126(e)(2) allows the court to consider only the judgment of conviction for which the "current sentence . . . was imposed." He points to *Blakely*, *supra*, 225 Cal.App.4th at p. 1059, which recognized that the "literal language" of section 1170.126(e)(2) requires that the "current sentence" be "imposed for" offenses appearing in section 667, subdivision (e)(2)(C)(i) through (iii) or section 1170.12, subdivision (c)(2)(C)(i) through (iii), and that

"strictly speaking," a petitioner would not have been sentenced for being armed during the commission of the offense. Appellant urges us to begin and end our statutory interpretation with the plain language, which he asserts has not been accorded "adequate significance." He finds further support for his plain language interpretation in the placement of section 1170.126(e)(2) between two subdivisions that "mandat[e] limited review by the court"; he argues that section 1170.126, subdivisions (e)(1) and (e)(3) both call for a superficial review of the judgment of conviction and that subdivision (e)(2), sandwiched between them, should require the same.

"In interpreting a voter initiative such as Proposition 36, we apply the same principles that govern the construction of a statute." (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) While our "first task is to examine the language of the statute enacted as an initiative, giving the words their usual, ordinary meaning" (*ibid.*), that is not, as appellant suggests, the end of our inquiry, even if the language is clear and unambiguous. Our ultimate goal is to ascertain and give effect to the intent of the voters and the underlying purpose of the law. (See *ibid.*) Thus, "[l]iteral construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) We accordingly consider "whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be

harmonized to the extent possible." (*Ibid.*) Additionally, "if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed." (*Ibid.*)

In approving the language of section 1170.126(e)(2) as part of Proposition 36, "the electorate declared that its purpose was both to prevent the early release of dangerous criminals and to relieve prison overcrowding by allowing low-risk, nonviolent inmates serving life sentences for petty crimes, to receive shorter sentences, thereby saving money while protecting public safety." (*People v. Guilford* (2014) 228 Cal.App.4th 651, 656.) "The electorate also mandated that [Proposition 36] be liberally construed to protect the health, safety, and welfare of the People." (*Ibid.*)

To advance these purposes, the electorate expressly included as a disqualifying factor for relief an inmate's intent, during commission of the third-strike offense, to cause great bodily injury to another person. Like the court in *Blakely*, *supra*, 225 Cal.App.4th at p. 1059, "[w]e are aware of no provision criminalizing, or permitting imposition of an additional sentence for, the mere intent to cause great bodily injury to another person." The voters therefore could not have intended to limit the disqualifying factors to those solely encompassed in the conviction offense. As the *Blakely* court recognized, "[t]he drafters of the initiative knew how to require a separate offense or enhancement if desired." (*Blakely*, *supra*, 225 Cal.App.4th at p. 1059.) Instead, they explicitly incorporated section 1170.12, subdivision (c)(2)(C)(iii) and its inclusion of intent, which cannot always be ascertained solely from a judgment of conviction.

This interpretation is consistent with the Supreme Court's rulings in *Estrada*, *supra*, 3 Cal.5th 661 and *Perez*, *supra*, 4

Cal.5th 1055. In *Estrada*, the Supreme Court considered whether a trial court could find a petitioner ineligible for Proposition 36 relief where "certain facts underlying a previously dismissed count show the inmate was 'armed with a firearm or deadly weapon' during the commission of the third strike offense." (*Estrada*, *supra*, 3 Cal.5th at p. 665.) The petitioner, whose third strike offense was grand theft from a person and was found ineligible for Proposition 36 relief due to being armed with a firearm during the offense, argued that the trial court improperly considered facts beyond those encompassed by the verdict or his guilty plea. (*Id.* at p. 669.) The Supreme Court, citing *Blakely*, *supra*, 225 Cal.App.4th at p. 1055, rejected this argument and concluded section 1170.12, subdivision (c)(2)(C)(iii) is "best read as excluding from resentencing 'broadly inclusive categories of offenders who, during commission of their crimes—and regardless of those crimes' basic statutory elements—used a firearm, were armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (*Estrada*, *supra*, at p. 670.)

The Court explained that its analysis "fits with other indicia of the Act's purposes." (*Estrada*, *supra*, 3 Cal.5th at p. 670.) "We see no indication in the Voter Information Guide that the Act was designed to equate the 'violent felons' category solely with those convicted of inherently violent offenses. To the contrary—we think it more faithful to Proposition 36's crucial distinction to interpret its conception of violent offenders as including not only those inmates convicted of inherently violent offenses but also those who committed nonviolent offenses in a violent manner. With section 1170.12, subdivision (c)(2)(C)(iii), Proposition 36 furthers its twin purposes by denying the latter

category of offenders the benefits of the Act. To construe the Act otherwise would substantially, and impermissibly, impair its purpose of distinguishing between violent and nonviolent offenders." (*Id.* at p. 671.) The Court further noted that judgments predating the passage of Proposition 36 "may at times fail to imply anything about disqualifying conduct, even if the evidence available to the prosecution could have supported such a finding," because prosecutors "had little reason to prove any conduct on a defendant's part that now constitutes disqualifying conduct under section 1170.12, subdivision (c)(2)(C)(iii)." (*Ibid.*) "For this reason, we think it unlikely that it was part of the Act's design to prevent courts reviewing a recall petition from considering conduct beyond that implied by the judgment." (*Ibid.*) The Court ultimately held that a trial court may consider not only facts beyond those encompassed in the judgment, but also "facts connected to dismissed counts, . . . if those facts also underlie a count to which the defendant pleaded guilty." (*Id.* at p. 674.)

In *Perez*, *supra*, 4 Cal.5th at p. 1059, the Court again considered "the nature of the inquiry that trial courts and the Courts of Appeal should apply when determining whether a defendant is ineligible to be resentenced on the ground that he or she was armed with a deadly weapon during the commission of his or her current offense." The Court held, "consistent with [its] decision in [*Frierson*], that Proposition 36 permits a trial court to find a defendant was armed with a deadly weapon and is therefore ineligible for resentencing only if the prosecutor proves this basis for ineligibility beyond a reasonable doubt." (*Ibid.*) It further held that "the trial court's eligibility determination may rely on facts not found by a jury; such reliance does not violate

the right to a jury trial under the Sixth Amendment to the United States Constitution." (*Ibid.*) The Court also expressly reiterated its *Estrada* holding, "that Proposition 36 permits a trial court to examine facts beyond the judgment of conviction in determining whether a resentencing ineligibility criterion applies." (*Id.* at p. 1063.)

These cases, which explicitly address the statutory interpretation question presented here, are binding upon us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Appellant contends otherwise, on the grounds that *Estrada* "did not give full consideration to the express limiting language of subdivision (e)(2)" and, because it predated *Frierson*, "had no occasion to consider any constitutional problems created by the present eligibility review scheme." He invokes the "time honored rule that cases are not authority for propositions not considered." This is not a defensible position. Although it was concerned with a different phrase, *Estrada* considered the very statutory provision and interpretation question appellant raises here. The Supreme Court also reiterated its *Estrada* holding in *Perez*, which post-dated and cited *Frierson*. Even if the holdings of those cases could be viewed as mere dicta (which they are not), "Supreme Court dicta generally should be followed, particularly where the comments reflect the court's considered reasoning." (*People v. Rios* (2013) 222 Cal.App.4th 542, 563.)

We are not persuaded to depart from the Supreme Court's reasoning by appellant's suggestion that permitting trial courts to consider facts outside the judgment of conviction "creates absurd consequences." The consequences he identifies are predicated on speculation: "it is reasonable to infer that if the disqualifying factor was not part of a charged offense or an

enhancement, then the prosecution concluded that it did not have sufficient evidentiary support. . . . As the disqualifying factor may not have had strong evidentiary support, the prosecution may have initially deemed it unworthy to litigate. However, it returns at a future hearing to prevent the release of the petitioner." As *Estrada* noted, prior to Proposition 36, "prosecutors had little reason to prove any conduct on a defendant's part that now constitutes disqualifying conduct under section 1170.12, subdivision (c)(2)(C)(iii)." (*Estrada*, *supra*, 3 Cal.5th at p. 671.) There are any number of reasons why a prosecutor might refrain from alleging a defendant was armed with a firearm, and intent to commit great bodily injury is not an element of the great bodily injury enhancement. (*People v. Conley*, *supra*, 63 Cal.4th at p. 660 & fn. 4.)

Appellant also suggests that "[a]llowing a broad and contentious eligibility review process simply keeps an otherwise suitable inmate in prison when he could be freed." He claims this case "is a good example of this concern," as six years elapsed between the filing of his petition and the court's denial of it. The two purposes of Proposition 36 are "mitigating punishment" and "protecting public safety." (*Estrada*, *supra*, 3 Cal.5th at p. 670.) While the goal of mitigating punishment might be advanced by expedited review, public safety may not be protected by a cursory review of the judgment of conviction. By incorporating section 1170.12, subdivision (c)(2)(C)(iii), Proposition 36 included in its ambit defendants "who committed nonviolent offenses in a violent matter." (*Id.* at p. 671.) Accurately determining which petitioners belong to that group may take time, particularly where, as here, the petitioner requests and receives numerous filing extensions.

II. Equal Protection

Appellant contends that two recent decisions, *Arevalo*, *supra*, 244 Cal.App.4th 836, and *Frierson*, *supra*, 4 Cal.5th 235, render section 1170.126(e)(2) "vulnerable to an equal protection attack." We disagree.

In *Arevalo*, the defendant was found guilty of the third strike offense of grand theft auto. He was acquitted of possessing a firearm and enhancements alleging he was armed during the commission of the offense. (*Arevalo*, *supra*, 244 Cal.App.4th at p. 843.) The trial court found him ineligible for Proposition 36 relief after reviewing trial testimony and concluding that he was "armed" during the offense. The trial court noted that the jury found the firearm allegation not true, but reasoned that finding did "not mean the nonexistence of guilt, factual innocence, or incredulity of testimony given at trial." (*Id.* at p. 844.) The court of appeal rejected the trial court's application of a preponderance of the evidence standard and held that the applicable standard of proof for ineligibility under Proposition 36 was beyond a reasonable doubt. It found that, by relying on "the disparity between 'beyond a reasonable doubt' and 'preponderance of the evidence' standards to find Arevalo ineligible for resentencing on the basis of an arming allegation that had been pled and disproved at his later trial," the court "completely revisit[ed] an earlier trial" and transformed "acquittals and not-true enhancement findings into their opposites." (*Id.* at p. 853.) In other words, the court concluded that an eligibility determination could not contravene a previous factual finding made at trial.

The Supreme Court agreed in *Frierson*. (*Frierson*, *supra*, 4 Cal.5th at pp. 230, 235.) It reasoned that nothing in Proposition 36 "suggests the electorate contemplated that a lower standard of

proof should apply at resentencing to compensate for any potential evidentiary shortcoming at a trial predating the Act." (*Id.* at p. 238.)

Appellant argues that these two rulings established an unconstitutional divide between two groups of Proposition 36 petitioners. The first group consists of petitioners whose disqualifying factors were pled and not proven at trial. This "class of petitioners seeking recall is shielded from ineligibility provided that the disqualifying factor under subdivision (e)(2) was found untrue either through and [*sic*] acquittal or an untrue finding on an enhancement." The second group consists of those who "face a finding of ineligibility based on a disqualifying factor that was not even charged in the underlying case so long as the disqualifying factor is supported by the record of conviction." Appellant offers an illustrative hypothetical contrasting two fictional defendants, one of whom was acquitted of being armed with a firearm and one of whom was never charged with that enhancement. He contends that the first defendant would get the benefit of *Arevalo* and *Frierson*, while the second would not.

Appellant is not in either of these hypothetical groups. The trial court found him ineligible for relief because the record revealed beyond a reasonable doubt that he intended to inflict great bodily injury on his spouse. Appellant was not charged with, nor could he have been charged with, intending to cause great bodily injury. (*People v. Conley*, *supra*, 63 Cal.4th at p. 660 & fn. 4.) Therefore, he was not acquitted of intending to cause great bodily injury, and the Proposition 36 court applied the reasonable doubt standard required by *Arevalo* and *Frierson*. "As we are not faced here with any assertedly unconstitutional application of the statute, . . . we have no occasion to address

[appellant's] constitutional argument on the merits." (*People v. Garcia* (1999) 21 Cal.4th 1, 11.)

Moreover, even if we did, the argument would fail. The Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution guarantee the equal protection of the laws to all persons. To succeed on an equal protection claim, appellant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. *(People v. Wilkinson* (2004) 33 Cal.4th 821, 836.) "Where a class of criminal defendants is similarly situated to another class of defendants who are sentenced differently, courts look to determine whether there is a rational basis for the difference. [Citation.]" (*People v. Edwards* (2019) 34 Cal.App.5th 183, 195.) "To mount a successful rational basis challenge, a party must '"negative every conceivable basis"' that might support the disputed statutory disparity. [Citation.] If a plausible basis exists for the disparity, '[e]qual protection analysis does not entitle the judiciary to second-guess the wisdom, fairness, or logic of the law.' [Citation.]" (*Id.* at pp. 195-196.)

Appellant has not made the threshold showing that section 1170.126(e)(2) classifies defendants in a disparate manner. No petitioner who committed his or her current offense with the intent to cause great bodily injury to another person is eligible for relief under Proposition 36. Even if a petitioner was charged with and acquitted of causing great bodily injury, a court may still find that he or she intended to cause such injury. (See *People v. Conley*, *supra*, 63 Cal.4th at p. 660 & fn. 4.) All petitioners who are found ineligible on this basis thus are similarly situated. No "constitutional doubt" warrants a contrary

conclusion.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

CURREY, J.